UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON TOXICS COALITION, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF INTERIOR, et al.,

Defendants,

and,

CROPLIFE AMERICA, WASHINGTON FRIENDS OF FARM AND FORESTS, et al.,

Intervenor-Defendants.

Case No. 04-cv-1998

FEDERAL DEFENDANTS' OPPOSITION TO MOTION TO COMPEL COMPLETION OF THE ADMINISTRATIVE RECORD

Note on Motion Calendar:
May 13, 2005

United States Dep't of Justice, P.O. Box 7369
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I. INTRODUCTION

Plaintiffs have challenged a set of regulations issued jointly by the National Marine Fisheries Service ("NMFS") and the United States Fish and Wildlife Service ("FWS") (together, the "Services"). Those regulations set forth procedures governing consultations conducted under the Endangered Species Act ("ESA") on certain agency actions relating to the regulation of pesticides by the United States Environmental Protection Agency ("EPA"). *See* 69 Fed. Reg. 47,732 (Aug. 5, 2004) (*codified at* 50 C.F.R. §§ 402.40 to 402.48).

This final rule was the product of an extensive notice-and-comment rulemaking process. The Service and EPA first published an Advanced Notice of Proposed Rulemaking ("ANPR"), 68 Fed. Reg. 3785 (Jan. 24, 2003), and received comments from over 300 groups, organizations, and individuals in response. After considering those comments, the Services issued proposed joint counterpart regulations.[1/] That proposed rule was subject to public comment for 3½ months. During that period, the Services received more than 125,000 comments from a range of interested parties that included States, agricultural interests, trade associations, industry coalitions, conservation and environmental groups, and private individuals. The final rule was issued on August 5, 2004 and included extensive responses to the comments received. 69 Fed. Reg. 47,732.

In response to Plaintiffs' challenge, the Services have submitted an administrative record that includes hundreds of documents, spanning more than 5,000 pages. It contains all documents relied upon by the Services. And it also includes more than 50 sets of substantive comments

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[1/]The Services' existing consultation regulations have always contained a provision for the issuance of "counterpart regulations." Those regulations provide that "[t]he consultation procedures set forth in this part may be superceded for a particular Federal agency by joint counterpart regulations . . . ." 50 C.F.R. 402.04. As the Services explained, counterpart regulations are intended to "allow individual Federal agencies to 'fine tune' the general consultation framework to reflect their particular program responsibilities and obligations." 51 Fed. Reg. 19,926, 19,937 (June 3, 1986); 43 Fed. Reg. 870, 871 (Jan. 4, 1978).

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submitted during the public comment period, including comments by all of the Plaintiffs in this case. The record includes a detailed statement of the Services' decision, the basis for that decision, and the agencies' findings.

Despite the extensive scope of the record, Plaintiffs now argue that the record is incomplete. Among other things, they demand that the record be supplemented with documents recording internal agency deliberations (such as drafts, notes, and e-mails) and EPA documents that were never submitted to the Services. The Services, however, have already submitted the complete administrative record and that record is the proper basis for judicial review in this matter. For these reasons, and all of the reasons discussed below, Plaintiffs' motion should be denied.

II. BACKGROUND

Plaintiffs' claims in this case are governed by the "arbitrary and capricious" standard of judicial review set out in the Administrative Procedure Act ("APA"). Under that standard, judicial review is limited to "the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988); *Friends of the Earth v. Hintz*, 800 F.2d 822, 828-29 (9th Cir. 1986).

It is the agency that compiles and designates the full administrative record that was before the agency. *Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 56-57 (D.D.C. 2003); *see also Florida Power & Light Co.*, 470 U.S. at 743-44. The agency is presumed to have properly designated the record "absent clear evidence to the contrary." *Fund for Animals*, 245 F. Supp. 2d at 55. Supplementation of the record "decidedly is the exception not the rule." *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1105 n.18 (D.C. Cir. 1979); *see also Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

III. ARGUMENT

A. Plaintiffs' motion should be denied because the Services have already submitted the "whole" administrative record.

The administrative record that the Services have submitted is the "whole" administrative record and is more than sufficient to allow effective judicial review here.[2/] None of the documents that Plaintiffs seek are properly included in the record.

1. The Services properly excluded internal agency deliberations from the administrative record.

Plaintiffs argue that the administrative record must include all of the notes, drafts, edits, comments, and e-mails that the Services generated during the development of these regulations – in short, all documents that record the internal deliberations of these agencies. Plaintiffs' Motion to Compel Completion of the Administrative Record ("Pl. Mot."), at 5, 7. Plaintiffs' argument shows a fundamental misunderstanding of the nature of APA review. The administrative record is not a history of the agency's internal deliberations, nor is the Court's role here to pass judgment on the agency's preliminary analyses or deliberations among staff. Rather, the Court's role is limited to reviewing the agency's final decision and that decision stands or falls on the administrative record provided by the agency. *Southwest Center for Biological Diversity v. Bureau of Reclamation,* 143 F.3d 515, 523 (9th Cir. 1998) (the only relevant question for the district court under the APA is whether the final agency decision meets the standards of the ESA and APA, not drafts); *In re: Comptroller of the Currency*, 156 F.3d 1279, 1280 (D.C. Cir. 1999).

Many courts have considered this issue and strongly rejected the idea that the administrative record should include documents recording internal agency deliberations. *See,*

[2/]Plaintiffs argue that the record "omits comparable documents reviewed by the NMFS decisionmaker." Pl. Mot. at 9 n.3. This is incorrect. Both FWS and NMFS have certified that these documents constitute the true and correct administrative record. *See* Exh. 1 to Federal Defendants' Notice of Filing of Administrative Record (Feb. 11, 2005)). This is, therefore, the record for the joint action of both agencies.

e.g., San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 751 F.2d 1287, 1323-24 (D.C. Cir. 1984) (denying plaintiffs' motion to supplement the record with transcripts of agency meetings and holding that such materials are "not properly a part of the record of these proceedings . . . ."); *Kansas State Network, Inc. v. FCC*, 720 F.2d 185, 191-92 (D.C. Cir. 1983); *Ohio Valley Env. Coalition v. Whitman*, No. 3:02-0059, 2003 WL 43377, at *6 (S.D.W.Va. Jan. 6, 2003) (rejecting motion to supplement the record with "internal EPA deliberations," including "internal reports, memoranda, and e-mails created by EPA staff for the use of other EPA staff"); *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001-02 (D.D.C. 1999); *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291, 1308-09 (W.D. Wa. 1994), aff'd 80 F.3d 1401 (9th Cir. 1996) (personal files and notes are not required to be part of the administrative record, and adequacy of the record will be upheld so long as it is sufficient to show the decisionmaking process and to permit review under the APA). Courts have rejected the inclusion of such materials in the record even where they were considered by the agency and even if they were adverse to the agency's final decision. *Ad Hoc Metals Coalition v. Whitman*, 227 F. Supp. 2d 134, 142 (D.D.C. 2002) (denying motion to supplement record with "a number of internal EPA e-mails exchanged throughout the . . . rulemaking process," even though those e-mails were "considered by EPA" and "adverse to the final rule" adopted by the agency).

The agency's internal deliberations are not included in the record because agency action is to be reviewed on its stated basis and the record evidence. *See, e.g., San Luis Obispo Mothers for Peace,* 751 F.2d at 1325 ("The principle that judges review administrative action on the basis of the agency's stated rationale and findings . . . is well-established.") (emphasis in original); *see also Kansas State Network, Inc.*, 720 F.2d at 191 ("[A]n agency's action should be reviewed based upon . . . the agency's stated justifications."). Agency opinions, like judicial opinions, "speak for themselves." *PLMRS Narrowband Corp.*, 182 F.3d at 1001 (citing *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994)). And courts should review those opinions on the basis of

"what was decided, not on what was considered." *Ad Hoc Metals Coalition*, 227 F. Supp. 2d at 143. As such, courts "do not ordinarily study predecisional transcripts of deliberations within an agency . . . ." *San Luis Obispo Mothers for Peace,* 751 F.2d at 1324. Because judicial review of agency action is not based on "the predecisional process that led up to the final, articulated decision," documents recording internal agency deliberations (including e-mails, drafts, meeting minutes, and notes) are irrelevant to the court's inquiry. *Ad Hoc Metals Coalition*, 227 F. Supp. 2d at 143; *see also Ohio Valley Env. Coalition*, 2003 WL 43377, at *6.

As such, these materials are not part of the Services' administrative record. Plaintiffs have confused the administrative record with the emphasis that the Freedom of Information Act ("FOIA") puts on finding "every scrap of paper . . . ." *Tomac v. Norton*, 193 F. Supp. 2d 182, 195 (D.D.C. 2002); *cf. Fund for Animals v. Williams*, 245 F. Supp. 2d at 57 n.7 (holding that a definition of the record that would "encompass any potentially relevant document existing within the agency or in the hands of a third party would render judicial review meaningless.").

Moreover, the inclusion of drafts, e-mails, notes, and meeting minutes in the administrative record could have a "chilling" effect on agency deliberations by "hinder[ing] candid and creative exchanges regarding proposed decisions and alternatives." *Ad Hoc Metals Coalition*, 227 F. Supp. 2d at 143; *see also Kansas State Network, Inc.*, 720 F.2d at 191; *Ohio Valley Env. Coalition*, 2003 WL 43377, at *6 (holding that the inclusion of such documents in the record "would also threaten to hamper the administrative process."). The fact that some of these documents may be available to the public through the FOIA is not significant because, while "*public* disclosure stifles debate to some extent, *judicial* disclosure would suppress candor still further since off-hand remarks could turn out to have a *legal* significance they would not have if barred from the record on review." *San Luis Obispo Mothers for Peace*, 751 F.2d at 1326 (emphasis in original).

Finally, the cases cited by Plaintiffs do not show that the "[c]ourts have consistently

rejected arguments that documents generated during the decisionmaking process can be excluded from the record," as Plaintiffs argue. Pl. Mot. at 8. Most of these cases do not address the proper scope of the record at all (or do so only in dicta), much less hold that documents containing internal agency deliberations must be included in the record. *See Southwest Center for Biological Diversity v. United States Bureau of Reclamation*, 143 F.3d 515, 518 (9th Cir. 1998) (not addressing the inclusion of internal agency deliberations in the record, but reviewing draft "reasonable and prudent alternative" in a case where draft may have been made public and scope of record was apparently undisputed); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1565, 1575 (10th Cir. 1994) (not addressing the inclusion of internal agency deliberations in the record, but holding that agency action was "arbitrary and capricious" because agency had failed to explain basis for its action); *Portland Aububon Society v. Endangered Species Comm.*, 984 F.2d 1534, 1539-43, 1549 (9th Cir. 1993) (holding that evidence on *ex parte* contacts during formal adjudication on the merits must be included in the record but also noting that such documents do not concern "the internal deliberative processes of the agency nor the mental processes of individual agency members"); *Thompson v. United States Department of Labor*, 885 F.2d 551 (9th Cir. 1989) (not addressing the inclusion of internal agency deliberations in the record, but holding that letters that were submitted to and considered by the agency were properly part of the record); *Environmental Defense Fund, Inc. v. Blum*, 458 F. Supp. 650, 654, 660-61 (D.D.C. 1978) (not addressing the inclusion of internal agency deliberations in the record, but holding that "considerable technical data" submitted during rulemaking process should be included in the record).

In fact, several of the cases cited by Plaintiffs expressly reject the conclusion that internal agency deliberations should be included in the record. For example, Plaintiffs cite *Ohio Valley Environmental Coalition v. Whitman.* Pl. Mot. at 7 (citing 2003 WL 43377, at *5). In that case, however, the court held that "internal reports, memoranda, and e-mails created by EPA staff for

the use of other EPA staff" should not be included in the record.[3] *Ohio Valley Env. Coalition*, 2003 WL 43377, at *6. As the court explained:

> In seeking to have these items included in the administrative record, the plaintiffs are attempting to inject internal EPA deliberations into this court's review of the agency's final approval of the West Virginia [Clean Air Act] program. But judicial review of a decision by an administrative agency is based on the reasons given by the agency and the information considered by the agency in the course of making the decision, not on the agency's internal decision-making process.

Id. at *6. Similarly, in *Fund for Animals v. Williams*, also cited by Plaintiffs, the court held that "an agency generally may exclude material that reflects internal deliberations." 245 F. Supp. 2d at 55.[4]

For all of these reasons, the Services properly excluded internal agency deliberations from the administrative record in this case.[5] Such documents are not relevant to judicial review of the Services' regulations, which must be reviewed on their stated basis and the record evidence.[6]

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[3]As the background of the case makes clear, the "initial proposals, comments, compromise, revisions, and final drafts" referred to by the court in the excerpt quoted by Plaintiffs consist of materials generated during the public notice and comment process – not documents recording internal agency deliberations. *Id.* at *3-*5.

[4]Plaintiffs also repeatedly cite *Miami Nation of Indians v. Babbitt*, 979 F. Supp. 771 (N.D. Ind. 1996), where the court ordered that the record be supplemented with certain "draft reports" and agency "notes and logs." *Id.* at 781. The court also stated in dicta that the record should be supplemented with "internal memoranda, guidelines, [and] hearing transcripts . . . ." *Id.* at 776. This decision is obviously not binding on this Court and Federal Defendants respectfully submit that it may have been wrongly decided (or is limited to the particular circumstances present in that case). But even this decision does not go as far as Plaintiffs here – the court did not order the agency to supplement the record with all internal notes, drafts, edits, comments, and e-mails, but only with a much more limited subset of documents. *Id.* at 781.

[5]Plaintiffs apparently object to the exclusion from the record of "internal discussions" that relate to NEPA issues. Pl. Mot. at 11. But, as discussed above, documents recording "internal agency deliberations," including any "internal discussions" addressing NEPA compliance, were properly excluded from the record.

[6]Plaintiffs argue that this record "stands in sharp contrast" to the administrative record filed in "a comparable challenge" to other regulations recently promulgated by the Services. Pl. Mot. at 8. As Plaintiffs acknowledge, however, those other regulations govern ESA consultations relating

2. The Services properly excluded documents held by other agencies that were not considered in the rulemaking.

In their initial correspondence, Plaintiffs demanded not only documents held by the Services, but also documents held by EPA, the United States Department of Agriculture, and the Council on Environmental Quality. Letter from Patti Goldman, Earthjustice, to James A. Maysonett, United States Department of Justice (Mar. 22, 2005) (attached as Exh. 2 to Declaration of Patti Goldman ("Goldman Decl.")), at 1. Plaintiffs sought both documents that these other agencies had submitted to the Services and relevant "internal communications" at these agencies "(such as meeting notes, emails, drafts, memoranda)" that were never considered or reviewed by the Services. *Id.* It is unclear whether Plaintiffs still seek such documents in their current motion. They state in a footnote that the record should be supplemented with "documents in EPA's possession from the time it oversaw the rulemaking process that are comparable to the Services' records added to the record."[7] Pl. Mot. at 6 n.1.

Whatever the case, there is no justification for including EPA documents that were never submitted to the Services (including internal EPA deliberations) in the record. The regulations challenged in this case were issued by the Services, not EPA. The Services, therefore, were the decisionmakers and it is black-letter administrative law that the administrative record should only consist of materials "considered by agency decision-makers . . . ." *Thompson v. United States Department of Labor*, 885 F.2d at 555. By extension, any documents that are held by other agencies, but which were not submitted to the Services, are not part of the administrative

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to the national fire plan. *Id.* They are entirely distinct from the regulations challenged in this case: they were not promulgated in the same agency action, they are not based on the same agency findings, and they do not share a common administrative record. As a result, the scope of the record in that case is not relevant here.

[7]As Plaintiffs note, Federal Defendants have agreed to supplement the administrative record with certain documents that were inadvertently omitted. Letter from James A. Maysonett, United States Department of Justice, to Patti Goldman, Earthjustice (Mar. 29, 2005) (attached as Exh. 3 to Goldman Decl.), at 2-3.

record. *See, e.g., Greene/Guilford Environmental Assoc. v. Wykle*, No. 03-2525, 2004 WL 727807, at *2 (3rd Cir. Mar. 12, 2004) (holding that "correspondence and internal e-mails" of agency that was not the decisionmaking agency were properly excluded from the record); *Saratoga Development Corp. v. United States*, 21 F.3d 445, 457 (D.C. Cir. 1994); *Tomac v. Norton*, 193 F. Supp. 2d at 195 (holding that "all other federal agencies involved in the decisionmaking process" were not "required to turn over all relevant information in their own files"). And to the extent that such documents also record internal agency deliberations, their inclusion would be doubly inappropriate for the reasons discussed above in Section III.A.1.

3. The Services properly excluded documents relating to EPA's past pesticide actions because those actions were not the basis for these regulations.

Plaintiffs complain that this record does not include documents relating to the past actions of EPA's pesticide program. Specifically, Plaintiffs argue that the record does not include "past criticisms" by the Services regarding EPA's past actions on particular pesticides (except those "criticisms" that were submitted by Plaintiffs with their public comments). Pl. Mot. at 1. And Plaintiffs also contend that the record does not include documents from an inter-agency review of EPA's pesticide risk assessment methods, which they allege began in 2000 and was a "prelude to this rulemaking." Pl. Mot. at 1, 3-4.

This claim rings hollow because Plaintiffs themselves had ample opportunity to submit any documents or criticisms that they deemed relevant during the extensive public comment period, yet apparently failed to do so. They cannot now complain that the record is incomplete. *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1306 (D.C. Cir. 1991) (holding that agency is not required to comb its files for allegedly relevant documents, rather it is incumbent on those participating in the administrative process to submit the documents to the proper rulemaking docket).

Moreover, this case is not a general referendum on EPA's pesticide program and its

compliance with the ESA. Rather, it is a challenge to a specific set of regulations. The Services have submitted the administrative record for those regulations. This record does not – and should not – include every document held by the Services that relates to EPA's pesticide program. *Id.*

Nor does the record include documents from past discussions between the Services and EPA on EPA's pesticide risk assessment methods (the "inter-agency review"). As the Services explained, these regulations were not based on EPA's past risk assessment practices, but rather on the new risk assessment process described in EPA's "Overview of the Ecological Risk Assessment Process in the Office of Pesticides Programs" (the "Overview Document"). The approach taken in the Overview Document "differs from the approaches EPA has used in the past." 69 Fed. Reg. 47,732, 47,752(Aug. 5, 2004). Thus, EPA's past practices were not part of the basis for these regulations – instead, the Services expressed their belief that "past determinations are not a relevant measure of EPA's ability to produce adequate effects determinations" and their confidence that "future effects determinations using the methodologies identified in the Overview Document will fully comport with the ESA." *Id.* Because the Services determined that EPA's past risk assessment practices were not relevant, documents relating to those practices were properly excluded from the administrative record.

4. The Services have not excluded "contrary evidence" from the record.

Throughout their motion, Plaintiffs claim that the Services have "excluded contrary evidence" from the administrative record. Pl. Mot. at 1-2. Plaintiffs also imply that the alleged exclusion of such documents from the record was an act of "bad faith" by the Federal Defendants. Pl. Mot. at 12. In fact, the Services have not excluded "contrary evidence." And while the parties have a dispute about the proper scope of the record, Federal Defendants strongly reject any implication that this record was submitted in "bad faith."

As Plaintiffs note, documents cannot be excluded from the record simply because they

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contain "evidence contrary to the agency's position."[8] *Thompson v. United States Department of Labor*, 885 F.2d at 555. The Services, however, have not done so. The record contains, for example, substantive comments submitted by all of the Plaintiffs in this case during the public comment period, including literally thousands of pages of documents that Plaintiffs attached to those comments. Since Plaintiffs opposed the promulgation of these regulations, these documents presumably contain whatever "contrary evidence" they believe exists.

Thus, at the same time that Plaintiffs argue that the record is "one-sided," they also contend that it already includes "numerous . . . critiques sent by the FWS to EPA on particular pesticides" and "[e]xamples" of critiques of EPA's risk assessment process. Pl. Mot. at 3. If Plaintiffs knew of any other allegedly "contrary evidence," they were obligated to put it before the agency during the public comment process. *See, e.g., Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (holding that plaintiffs "had some obligation to raise these issues during the comment process" and rejecting claim that record was incomplete because it did not contain letters submitted after the agency had made its decision).

The Services did not act in "bad faith" by excluding certain categories of documents from the administrative record (including, for example, internal agency deliberations).[9] As discussed above, those documents were never properly part of the record. Moreover, those documents

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[8] Plaintiffs also argue that "contrary evidence" must be included in the record because the Court may still find the Services' actions to be "arbitrary and capricious," even if they are supported by "substantial evidence," if there is other evidence in the record that "detracts from that relied upon by the agency . . . ." Pl. Mot. at 11. To support this argument, they cite *American Tunaboat Ass'n v. Baldridge*, 738 F.2d 1013, 1016 (9th Cir. 1984). In that case, however, the Ninth Circuit was applying the "substantial evidence" standard to its review of a "formal" rulemaking. Under the APA, that standard only applies to "formal" rulemakings or adjudications. 5 U.S.C. § 706(2)(E). Here, the Services' regulations were promulgated in an "informal" notice-and-comment rulemaking and the "arbitrary and capricious" standard applies.

[9] Plaintiffs cite *Maritime Management, Inc. v. United States*, 242 F.3d 1326 (11th Cir. 2001). Pl. Mot. at 12. In that case, Federal Defendants were under a special statutory obligation to include "all relevant documents" in the administrative record. *Maritime Management, Inc.*, 242 F.3d at 1328 n.1 & 1329. That statutory provision does not apply here.

were excluded categorically, regardless of their content, and not because they did (or did not) contain "contrary evidence." Nor have Plaintiffs made the "strong showing" of bad faith necessary to allow the Court to inquire outside of the agency record. *See, e.g., Animal Defense Council v. Hodel*, 840 F.2d at 1437.

IV. CONCLUSION

For all of these reasons, Plaintiffs' motion to compel should be denied.

In the event that the Court does grant this motion, in whole or in part, Federal Defendants request a period of no less than sixty (60) days to compile and submit a supplement to the administrative record. This time will be necessary given both the extensive array of materials that Plaintiffs have requested and because the compilation of such materials will require coordination among several Federal agencies.

Finally, Federal Defendants agree with Plaintiffs that a new schedule for summary judgment briefing will be necessary, *see* Pl. Mot. at 12, and join in their request for leave to present a new schedule to the Court.

Dated: May 2, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2005, I electronically filed Federal Defendants' Opposition to Motion to Compel Completion of the Administrative Record with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Patti A. Goldman, counsel for Plaintiffs, J. Michael Klise and John James Leary, Jr., counsel for Intervenor-Defendants CropLife America, and Russell C. Brooks, counsel for Intervenor-Defendants Washington State Farm Bureau et al.

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